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# The United States' Position on the Extraterritorial Application of Human Rights Obligations: Give It Up

Beth Van Schaack\*

## A. Introduction

The extraterritorial application of states' human rights obligations has emerged as a pressing issue in international human rights law.<sup>1</sup> And, it is destined to remain so given that states are increasingly asserting their power abroad in ways that affect the rights of individuals beyond national borders.<sup>2</sup> Although not confined to this context,<sup>3</sup> the debate has been most heated in connection with modern-day armed conflicts that entail states deploying their troops and other personnel on the territory of one or more other states but in confrontation with insurgents, terrorists, and other non-state actors. Although transnational in their scope and impact, international humanitarian law (IHL) considers these conflicts to be non-international armed conflicts (NIACs), because they do not pit two or more High Contracting Parties of the 1949 Geneva Conventions against one another—the technical predicate for an international armed conflict (IAC).<sup>4</sup> Most conflicts in the world today are NIACs, yet the positive law governing targeting decisions, detention operations, and the range of other issues that arise in these conflicts is significantly less developed than that governing IACs. Moreover, these situations may evolve in and out of full-blown conflict, effectively switching IHL on and off.<sup>5</sup> The impulse to look to human rights law to provide added constraints on state behavior, offer a remedy for victims of violence, and fill lacunae in—or backstop—the applicable IHL is thus a compelling one. As a result, the question of the extraterritorial application of human rights obligations has become entangled in the choice of law debate over when human rights law applies in situations of armed conflict that are also governed by IHL.<sup>6</sup> In many of today's transnational NIACs, however, the

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<sup>1</sup> Examples of the leading scholarship in this area are: MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011); KAREN DA COSTA, *THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES* (2013).

<sup>2</sup> Kal Raustiala, *A Response to Milanovic*, OPINIOJURIS, <http://opiniojuris.org/2011/12/02/a-response-to-milanovic/> (noting the increase in states' "ability to project power at a distance, and to move people to distant places" as well as conflicts that seem "to bleed over to many discrete locations that are neither subject to pervasive armed conflict nor are belligerently occupied"; all of which make "the extraterritorial application questions far harder, but also far more pertinent.").

<sup>3</sup> The issue of the extraterritorial application of human rights law can also arise in connection with states' policies and conduct in the realms of immigration, trade, development, participation in international organizations, national security outside of any armed conflict, peacekeeping and peace enforcement operations, foreign intelligence, and law enforcement.

<sup>4</sup> Article 2, Geneva Convention Relative to the Treatment of Civilian Persons in Time of War ("GC IV") (August 12, 1949), T.I.A.S. 3365.

<sup>5</sup> Sarah Cleveland, *A Response to Milanovic*, OPINIOJURIS, <http://opiniojuris.org/2011/12/05/a-response-to-milanovic-2/>.

<sup>6</sup> A number of competing paradigms govern the question of when IHL displaces, or must be harmonized with, other potentially applicable bodies of law, including human rights law and domestic law. For background see Charles P. Trumbull, *Filling the "Gaps" in the Law Applicable to Non-International Armed Conflicts*, INTERCROSS,

question of the extraterritorial application of human rights law must be resolved before it can be determined which human rights obligations apply alongside any applicable IHL rules. This article aims to focus on this antecedent question.

As domestic courts, international tribunals, and human rights treaty bodies increasingly confront fact patterns and claims requiring a consideration of whether a particular human rights obligation applies extraterritorially, they have struggled to create a defensible and coherent framework of analysis. This process of doctrinal development and evolution has been decentralized to a certain degree since the various human rights instruments contain slightly different formulations for their scope of application, and there is no appellate body to harmonize the law. Nonetheless, through a process of cross-fertilization and parallel reasoning, a doctrinal convergence is now discernable within the opinions and other views of authoritative decision-makers representing the range of human rights treaty bodies and tribunals that have confronted the issue. According to this consensus, states owe human rights obligations to all individuals within the authority, power, and control of their agents or instrumentalities and can be found responsible whenever they cause harm to such individuals. In terms of which rights and obligations apply extraterritorially, human rights bodies are increasingly adopting a calibrated approach that hinges on the nature of the right, the degree of control the state exercises over the territory, individuals, or transaction in question.

Starting in 1995, but more consistently during the Bush Administration, the United States has in its filings before these human rights bodies<sup>7</sup> advanced a categorical and contrarian position that the obligations contained in the relevant human rights instruments have no extraterritorial application.<sup>8</sup> This unqualified position is increasingly out-of-step with the established

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<http://intercrossblog.icrc.org/blog/contemporary-ihl-challenges-use-force-and-non-international-armed-conflicts>; Beth Van Schaack, *The Interface of IHL and IHR: A Taxonomy*, JUSTSECURITY, <http://justsecurity.org/2013/10/08/interface-ihl-ihr-taxonomy/>.

<sup>7</sup> A number of human rights treaties have established committees of independent experts who are charged with supervising state compliance with treaty undertakings through periodic state reporting, the issuance of general comments (akin to advisory opinions) and reports, and quasi-adjudicatory claims procedures undertaken in connection with individual petitions. Given its ratification status, the United States is subject to four out of the eight of these bodies operating under the auspices of the UN High Commissioner of Human Rights: the Human Rights Committee (which monitors the ICCPR), the Committee Against Torture (which monitors the Torture Convention), the Committee on the Elimination of Racial Discrimination (same for the Convention on the Elimination of Racial Discrimination), and the Committee on the Rights of the Child (the US has ratified two Optional Protocols to the Convention on the Rights of the Child (CRC) but not the parent treaty). The United States has not yet ratified the International Covenant on Economic, Social and Cultural Rights (ICESC), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities, or the UN Committee on Migrant Workers and their Families, each of which has a corresponding experts committee. In addition, the United States is also subject to the supervisory jurisdiction of the International Labor Organization's Committee of Experts and Committee on Freedom of Association and—by virtue of its membership of the Organization of American States (OAS)—the Inter-American Commission on Human Rights (IACHR), although it contests the full reach of that Commission as will be discussed. The Human Rights Committee, which monitors the ICCPR, accepts individual petitions; however, the United States has not ratified the necessary Optional Protocol. See generally Tara Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 210 (Cesare P.R. Romano, Ed. 2009).

<sup>8</sup> Most recently, in the face of a proposal by Brazil and Germany to recognize an international right to privacy, the United States succeeded in ensuring that the final General Assembly resolution did not mention any extraterritorial impact. See Colum Lynch, *Inside America's Plan to Kill Online Privacy Rights Everywhere*, FOREIGN POLICY

jurisprudence and with arguments being advanced, and conceded, by our coalition partners and other allies.<sup>9</sup> As such, the United States now finds itself in a knotty adversarial posture with several human rights bodies on this issue and the related choice of law question.<sup>10</sup>

This firm stance confirms the United States as a persistent objector to any emerging customary norm. Nonetheless, the failure to acknowledge limited, well-established, and principled exceptions to a strictly territorial application of its human rights obligations ultimately undermines the legitimacy of U.S. arguments in these fora as well as its commitment to the human rights project more broadly. The upcoming hearings before the Human Rights Committee (HRC)—the treaty body charged with interpreting the International Covenant on Civil and Political Rights (ICCPR)—offer an opportunity for the Obama Administration to advance a more nuanced position that allows it to remain faithful to its *lex specialis* arguments, but also to make certain strategic concessions on extraterritoriality.<sup>11</sup> The proposed shift in approach will demonstrate the United States’ respect for the views of human rights bodies and of its allies, bolster the universality of certain core human rights protections, and do much to bring to a close a historical chapter marred by allegations that the United States was endeavoring to create, and exploit, rights-free zones. Furthermore, the change of course advocated will not prejudice, and may actually enhance, more meritorious arguments at the United States’ disposal.

This dispute is more than a simple matter of competing semantics and treaty interpretations that will be resolved by clever exercises of statutory interpretation or a more searching review of the legislative history. Rather, there are broad philosophical principles at issue that go to the very heart of the human rights project. In particular, this debate surfaces a perennial tension between the idealized vision of human rights as universal attributes that we all enjoy simply by virtue of our shared humanity and the more realist view that human rights obligations are merely contractual undertakings that are binding only insofar as states have specifically consented to them as a function of *pacta sunt servanda*. And yet, the applicable texts are open to several equally plausible interpretations, and the legislative history is inconclusive as to states’ original intentions; this indeterminacy invites a teleological interpretive approach that must prioritize universality. The law has headed in a direction that is consistent with this imperative and is keeping pace with globalization and multitude of ways that states can assert their power abroad.

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(Nov. 20, 2013) (“American diplomats are pushing hard to kill a provision of the Brazilian and German draft which states that ‘extraterritorial surveillance’ and mass interception of communications, personal information, and metadata may constitute a violation of human rights. ... The United States negotiators have been pressing their case behind the scenes, raising concerns that the assertion of extraterritorial human rights could constrain America’s effort to go after international terrorists.”).

<sup>9</sup> See Cleveland, *supra* note \_\_\_\_ (cataloging submissions by United States allies). The U.S. position is closest to that advanced by the Government of Israel, given that the issue of extraterritoriality of human rights obligations has deep implications with respect to the occupied territories, along with Canada and the United Kingdom. On Israel’s position, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 (9 July 2004), ¶ 110.

<sup>10</sup> See Geneva 001769, *UN Human Rights Committee—USG July 17018 Public Hearing*, available at <http://www.state.gov/documents/organization/131739.pdf>, ¶¶ 11-12 (delegation cable noting that the HRC had “pointedly critical” questions and comments and was “strongly opposed to the United States’ longstanding and principled legal interpretation (which the delegation resolutely defended) that the Covenant does not apply to activities of States Parties outside their territory”).

<sup>11</sup> These proceedings were originally scheduled for November, 2013, but the sequester negotiations prevented the U.S. delegation from traveling. CITATION.

This is fitting, because the alternative—that the treaties would permit states to harm people abroad in ways that would be prohibited at home—is untenable and perverse.

The United States’ so-called legal position actually reflects a strategic policy choice to endeavor to evade scrutiny of its extraterritorial exploits on the merits. Given that there are well-developed arguments that its conduct in the range of conflicts in which it finds itself is in full compliance with applicable law—be it human rights law or humanitarian law<sup>12</sup>—the United States should have nothing to fear from relinquishing a threshold argument that is increasingly untenable in light of the prevailing practice, law, and theory. Indeed, by abandoning this dead letter, the United States will increase the legitimacy of other arguments in its defense, including its *lex specialis* arguments in favor of the application of IHL over human rights law in the situations of greatest concern to the United States: the conduct of military operations abroad, including through the use of remotely piloted vehicles.

This paper proceeds in four steps. By way of background, it quickly reviews the relevant treaty language and *travaux préparatoires*. With reference to exemplary decisions, it then maps the process of doctrinal development across the array of human rights treaty bodies and international tribunals (with a nod to some relevant domestic pronouncements) in order to identify the expanding areas of doctrinal consensus. Against this backdrop, it presents the United States’ rhetorical positions before several human rights bodies. By way of prescription and conclusion, it suggests some subtle concessions the United States could make in the forthcoming consultations before the Human Rights Committee, where it has reached a “stalemate” on this question.<sup>13</sup> Although at first glance the United States position appears deeply entrenched, subtle cues in the United States’ most recent submission to the HRC suggests that its position on these issues may be softening and that the time for such a shift in approach may be ripe.

## B. The Texts & Their Origins

The various human rights treaties and instruments contain slightly different formulations for their scope of application. Several hortatory pronouncements, such as the 1948 Universal Declaration of Human Rights (UDHR), do not contain any jurisdictional limitations at all, framing their articulated rights as universally applicable to all persons under all circumstances.<sup>14</sup> This is also

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<sup>12</sup> See, e.g., Harold Hongju Koh, *The Obama Administration and International Law*, American Society of International Law (25 Mar. 2010), <http://www.state.gov/s/1/releases/remarks/139119.htm>.

<sup>13</sup> See Cleveland, *supra* note \_\_\_\_.

<sup>14</sup> Article 2 of the UDHR states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The 1948 American Declaration on the Rights and Duties of Man similarly states at Article II: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”

the approach of the 1949 Geneva Conventions and their Protocols<sup>15</sup> as well as the 1948 Genocide Convention.<sup>16</sup> Similarly, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) does not contain a jurisdictional clause and actually obliges states parties to take steps individually and through “international assistance and cooperation” to progressively realize the Covenant’s rights.<sup>17</sup> By contrast, the rest of the human rights treaties, many of which are subject to enforcement or interpretation by a supranational court or expert body, do contain jurisdictional limitations. The most common formulation relies on the concept of the state party’s “jurisdiction”, which is susceptible to multiple interpretations beyond merely the state party’s “territory.”<sup>18</sup> For example, several treaties impose their obligations with respect to all “territory under [the state party’s] jurisdiction”<sup>19</sup> implying that the two terms are not synonymous. Indeed, none of these treaties is expressly territorial in the sense contemplated by Article 29 of the Vienna Convention on the Law of Treaties.<sup>20</sup>

The European Court of Human Rights’ (ECHR) decisions concerning the European Convention on Human Rights—which are enforceable against states within the Council of Europe—have been highly salient in this debate. The most important treaty from the United States’ perspective, however, is the International Covenant on Civil and Political Rights (ICCPR), so this paper will conduct a deeper dive into its text, origins, and subsequent interpretation. That said, many of our key allies and coalition partners are subject to the European Convention and Court, and so the latter’s jurisprudence will be scrutinized in so far as it impacts and is consistent with the direction the law has moved.

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<sup>15</sup> For example, Common Article 1 to the 1949 Geneva Conventions provides: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” GC IV, *supra* note \_\_\_\_.

<sup>16</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Res. 260 (III) (9 Dec. 1948); *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Prel. Obj., Judgment, ICJ Reports 1996 (11 July 1996), at ¶ 31 (“[T]he rights and obligations enshrined in the Convention are rights and obligations *erga omnes*. ... [T]he obligation each state has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”).

<sup>17</sup> Article 2(1) provides in full:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

<sup>18</sup> Article 1 of the 1950 European Convention on Human Rights reads: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.” Article 2 of the Convention on the Rights of the Child makes reference to the duty of states parties to both respect and to ensure the enumerated rights to “each child within their jurisdiction.”

<sup>19</sup> The 1966 Convention on the Elimination of Racial Discrimination provides at Article 3 that: “States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit, and eradicate all practices of this nature in territories under their jurisdiction.” Similarly, the 1984 U.N. Convention Against Torture (Article 2(1)) states: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” The treaty also confirms at Article 2(2) that a state of war cannot be invoked to justify acts of torture.

<sup>20</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980. Article 29 reads: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

The ICCPR, which opened for signature in 1966, contains a unique and enigmatic formulation, in which much turns on the meaning of the second “and” in Article 2(1), italicized below:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind...<sup>21</sup>

This formulation is susceptible to three competing interpretations. The first reading of Article 2(1) is a conjunctive one advanced by the United States to mean that a state subject to the ICCPR owe duties only to those individuals who are within *both* its territory *and* its jurisdiction. This interpretation, while perhaps most semantically natural one, creates some conceptual oddities with certain Covenant rights, such as the right to return to one’s country enshrined in Article 12(4).<sup>22</sup> A disjunctive interpretation of Article 2(1) yields the more expansive conclusion that the Convention actually applies to two classes of individual: persons within the state’s territory as well as persons within the state’s jurisdiction. In any case, to avoid surplusage, both approaches depend on the ability to identify examples of persons who are within a state’s territory, but not its jurisdiction, and vice versa. The former would, under certain circumstances, include diplomats assigned to international organizations as well as persons on a portion of the territory of a state party that is controlled by a rebel or insurrectionist entity or is otherwise outside of the central government’s jurisdiction in the sense of power or effective control. Although such cases arise, the case law is more often concerned with identifying the latter class of persons: those individuals who are not within the state’s territory but are nonetheless within its jurisdiction.

In 2005, the Human Rights Committee issued General Comment 31, an omnibus opinion on the “Nature of the General Legal Obligation Imposed on States Parties to the Covenant.”<sup>23</sup> The Committee adopted the first disjunctive approach to Article 2(1) when it wrote:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.<sup>24</sup>

Finally, an alternative disjunctive approach to Article 2(1) has emerged whereby the territorial clause modifies only the obligation to “ensure” Covenant rights (in the sense of taking positive

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<sup>21</sup> Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by GA Res. 45/158 (18 Dec. 1990), contains a more expressly disjunctive formula:

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind ...

<sup>22</sup> See MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY 43 (2d ed. 2005) (“An expressly literal reading would ... lead to often absurd results.”).

<sup>23</sup> Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). General comments are authoritative but technically non-binding pronouncements on treaty interpretation.

<sup>24</sup> *Id.* at ¶ 10.

steps to give effect to rights and to prevent and redress the violation of those rights by third parties), which would apply only to individuals within states' territory and subject to their jurisdiction. States would be obliged to "respect" the rights set forth in the Covenant under all circumstances, without territorial limitation.<sup>25</sup> This distinction between what have been called negative and positive obligations finds some affinity in the formulation of the contemporaneous American Convention on Human Rights (1969), which embodied within a treaty many of the rights contained in the American Declaration. The American Convention states at Article 1(1) that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination ...<sup>26</sup>

Similarly, the European Convention on Human Rights in Article 1 identifies the obligation to "secure" the enumerated rights and freedoms within states' jurisdiction, potentially taking for granted—as argued by one commentator—that the obligation to "respect" those rights is susceptible to no jurisdictional limitation.<sup>27</sup> In all these formulae, much hinges on what it means to be within a state's "jurisdiction."

The legislative history of these instruments provides some insight into the intentions of the states that negotiated the core texts. During the drafting of the ICCPR, it was the United States delegation that proposed the addition of "within its territory" to Article 2(1), which originally only made reference to states' "jurisdiction."<sup>28</sup> The United States was particularly concerned with the prospect of assuming obligations to adopt legislation that would guarantee the rights contained in the Covenant to residents of territory occupied since World War II but gradually being transitioned to local authorities.<sup>29</sup> There was also a concern about individuals asserting

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<sup>25</sup> Rolf Künnemann, *Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 201, 228-9 (Fons Coomans & Menno T. Kamminga Eds., 2004); Milanovic, *supra* note \_\_ ("I thus argue that while the state's overarching positive obligation to secure or ensure human rights even from violations by private actors should be conditioned by a spatial notion of jurisdiction as control of an area, since in the overwhelming majority of cases the state would need such control to effectively comply with its obligations, its negative obligations—e.g. not to kill an individual without sufficient justification—should be territorially unlimited, since the state can always refrain from a specific act").

<sup>26</sup> The Convention also contains a most favored rights clause at Article 29 providing that nothing in the treaty should be interpreted as restricting the enjoyment of the enumerated rights or freedoms or precluding other rights that are inherent in the human personality or derived from representative democracy.

<sup>27</sup> Künnemann, *supra* note \_\_, at 229. The title of this provision, however, is "Obligation to *Respect* Human Rights" (emphasis mine).

<sup>28</sup> See NOWAK, *supra* note \_\_, at 30-34. The reference to persons within the state's "jurisdiction" replaced a reference to persons residing in a state's "territory" in the European Convention during the drafting period. See Rick Lawson, *Life After Banković: On the Extraterritorial Application of the European Convention on Human Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 82, 88 (Fons Coomans & Menno T. Kamminga Eds., 2004).

<sup>29</sup> Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 123-24 (2005) (noting Eleanor Roosevelt's unwillingness to assume "an obligation to ensure the rights recognized in [the Covenant] to the citizens of countries under United States occupation" by requiring it to enact legislation concerning those persons who were subject to the jurisdiction of the occupying state in some respects, but not others); see also DA COSTA, *supra* note \_\_, at 24-40.



rights against their state of origin beyond those that could be fulfilled through standard diplomatic protection measures and that would otherwise fall under the competence of the state of residence.<sup>30</sup> Other delegations—primarily concerned with confirming that states retain obligations to guarantee the Covenant’s rights to their own citizens abroad—unsuccessfully opposed the proposed amendment.<sup>31</sup>

Although drafters finally reached a consensus as to the textual formulation of Article 2, this accord does not necessarily evince a consensus as to how that language should be interpreted; that question may have deliberately been left ambiguous. This obscured plurality of views is, of course, the risk of joining any multilateral regime. Thus, given that the text is susceptible to multiple interpretations, it may be of no moment that the contemporary approach runs counter to the United States’ expectations. All told, commentators who have really dug into the archives have determined that the *travaux* are inconclusive as to the full intent of the drafters, but—at a minimum—these records do not express a clear sentiment the Covenant should never apply extraterritorially.<sup>32</sup> In any case, by the time of U.S. ratification, the HRC had already opined on the extraterritorial application of the Covenant.<sup>33</sup> Nevertheless, this issue was not raised when the United States ratified the ICCPR in 1992, even though the Senate attached a number of reservations, declarations, and understandings.<sup>34</sup>

Although a semantic analysis of these texts coupled with careful resort to their legislative histories provides some insights of relevance, no definitive conclusion as to the treaties’ extraterritorial reach can be discerned. Moreover, although they were concerned with cabining the treaty’s impact on situations of occupation, the delegations involved in the drafting negotiations were not sufficiently prescient to contemplate all the potential situations in which the question of extraterritorial obligations might arise. When language is indefinite, either inadvertently or by design, state representatives in effect delegate interpretive authority to courts and other enforcement bodies. As such, it has been left to the various judicial and quasi-judicial bodies with responsibility for administering, interpreting, and ensuring compliance with the treaties and other instruments to determine the full scope of their extraterritorial reach, with reference to the instruments’ object and purpose as well as subsequent state practice.<sup>35</sup>

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<sup>30</sup> *Legal Consequences*, *supra* note \_\_\_, at ¶ 109.

<sup>31</sup> Dennis, *supra* note \_\_\_, at 124.

<sup>32</sup> Dominic McGoldrick, *Extraterritorial Application Of The International Covenant On Civil And Political Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 41, 66-67 (Fons Coomans & Menno T. Kamminga Eds., 2004).

<sup>33</sup> See, e.g., *Lopez-Burgos v. Uruguay*, Comm. No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (29 July 1981).

<sup>34</sup> U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), available at <http://www1.umn.edu/humanrts/usdocs/civilres.html>.

<sup>35</sup> Article 31, Vienna Convention, *supra* note \_\_\_. Human rights treaties are particularly susceptible to this teleological interpretative approach. For example, the ECHR has made clear that the European Convention is a “living instrument” that must be interpreted in light of contemporary realities. *Loizidou v. Turkey*, Judgment/Preliminary Objections, App. No. 15318/89 (23 Mar. 1995), at ¶ 71 (“these provisions [governing both substance and enforcement] cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.”); *Soering*, *supra* note \_\_\_, at ¶ 87 (“the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. ... In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with ‘the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society’”) (citations removed).

### C. The Jurisprudence

The “jurisprudence” in this area has evolved rather haphazardly in the face of idiosyncratic fact patterns that have come before different human rights treaty bodies and international tribunals in a range of conflict and non-conflict situations.<sup>36</sup> The ECHR’s jurisprudence tends to receive the most attention in this field, but its case law is enhanced and informed by pronouncements by the Human Rights Committee, the Inter-American Commission on Human Rights, the Committee Against Torture, and other such bodies.<sup>37</sup> To be sure, many decision-makers preface their assertions of jurisdiction with the observation that human rights obligations are primarily territorial, suggesting what amounts to a presumption against extraterritoriality unless one of the identified exceptions has been proven. The ECHR is the most wedded to this meme—insisting on the “essentially territorial notion of jurisdiction” with “other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.”<sup>38</sup> That said, a longitudinal review of the cases reveals a distinct trend toward an understanding that states’ human rights obligations follow their agents and instrumentalities offshore whenever they are in a position to respect, or to violate, the rights of individuals they confront abroad. Even the ECHR is gradually bending toward the reasoning of its sister interpretive bodies. As a result, at this point in time, the reach of these various instruments is largely co-extensive, and it is possible to identify a taxonomy of situations in which there is a consensus that states’ human rights obligations apply extraterritorially. Even within the ECHR jurisprudence, these so-called exceptions are sufficiently numerous and diverse such that the default position is more pocked than plenary. Some variation continues to exist, however, in the hard cases: when states engage in remote extrajudicial killings.

#### 1. Territorial Actions With Extraterritorial Implications or Effects

One discrete class of situations involves acts committed domestically that have extraterritorial human rights implications or effects—so-called indirect extraterritorial effect cases.<sup>39</sup> This theory of extraterritoriality developed in connection with decisions to extradite, deport, or otherwise remove individuals to countries where they may not enjoy the panoply of due process

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<sup>36</sup> United Nations political bodies have also weighed in on this issue. *See, e.g.*, Comm’n on Human Rights, Res. 1991/67, Doc. E/CN.4/1991/91 (6 Mar. 1991) (condemning Iraq’s grave violations of human rights against the Kuwaiti people in violation of the UN Charter, human rights treaties, and other relevant legal instruments, and appointing a special rapporteur to investigate the situation of human rights under Iraqi occupation); GA Res. 45/170, The Situation of Human Rights in Occupied Kuwait (18 Dec. 1990), at ¶¶ 1, 9 (condemning human rights violations against the Kuwaiti people and asking the Commission on Human Rights to examine the human rights situation in Kuwait). By contrast, the Security Council simply reaffirmed Iraq’s responsibility under international humanitarian law, including GC IV. *See* U.N. Sec. C. Res. 666 (prmb) (13 Sept. 1990). The General Assembly has similarly called upon Israel to adhere to its human rights obligations in the occupied territories, although that is obviously a special case. *See, e.g.*, GA Res. 2443 (XXII) (Dec. 19, 1968).

<sup>37</sup> For a fuller survey of these cases, see Oona A. Hathaway et al., *Human Rights Abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389 (2011).

<sup>38</sup> *Banković*, *supra* note \_\_\_, at ¶ 61.

<sup>39</sup> *DA COSTA*, *supra* note \_\_\_, at 57.

protections<sup>40</sup> or where they may be subject to the death penalty.<sup>41</sup> The Human Rights Council in a General Comment reinforced this line of cases when it wrote:

the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm ... either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.<sup>42</sup>

These cases turn on two elements: the state's exclusive control over the putative victim with respect to the decision and destination—even though it may exercise no control over the individual once he or she leaves the state's territory—and the foreseeability of the extraterritorial rights violation within the destination state.<sup>43</sup> The state's liability is traceable to the fact that it operates as “a link in the causal chain that would make possible violations in another jurisdiction.”<sup>44</sup> This brand of extraterritorial jurisdiction can exist even when a statutory scheme enacted by the state party has certain deleterious effects on individuals residing elsewhere.<sup>45</sup>

At the same time, and by way of limiting principle, courts and other bodies have generally rejected an unrestricted effects test.<sup>46</sup> As such, simply being affected abroad by an act

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<sup>40</sup> See *Cruz Varas and Others v. Sweden*, ECHR, Judgment, App. No. 15576/89 (20 Mar. 1991) (finding no violation of the Convention where Chilean citizens were refused refugee status and ordered expelled).

<sup>41</sup> *Soering v. United Kingdom*, ECHR, Judgment, App. No. 14038/88 (7 July 1989), at ¶ 91 (“liability [may be] incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment”); *Ng v. Canada*, HRC, Comm. No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (7 Jan. 1994), at ¶ 6.2 (“if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over.”); *Kindler v. Canada*, HRC, Comm. No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (11 Nov. 1993), at ¶ 6.2 (same); *A.R.J. v. Australia*, HRC, Comm. No. 692/1996, U.N. Doc. CCPR/C/60/D/692/1996 (28 July 1997), at ¶¶ 6.12-6.15 (determining that a violation of due process rights was not a necessary and foreseeable consequence of petitioner's return to Iran).

<sup>42</sup> General Comment No. 31, *supra* note \_\_\_, at ¶ 12.

<sup>43</sup> *Al-Saadoon and Mufdhi v. the United Kingdom*, ECHR, Judgment, App. No. 61498/08 (4 Oct. 2010), at ¶ 123 (finding potential liability when individuals are transferred between states where “substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to” ill-treatment).

<sup>44</sup> *Munaf v. Romania*, HRC, U.N. Doc. CCPR/C/96/D/1539/2006 (21 Aug. 2009), at ¶ 14.2. In *Munaf*, the government attempted to argue that the petitioner was never actually in its custody, although he was in a Romanian embassy when he was handed over to U.S. military personnel, who allegedly mistreated him. *Id.* at ¶¶ 4.10-4.12, 7.5. The HRC instead found that the harm to Munaf would not have been foreseeable to Romania at the time and so Romania bore no responsibility. *Id.* at ¶¶ 14.2-14.6.

<sup>45</sup> *Ibrahim Gueye et al. v. France*, HRC, Comm. No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (6 April 1989), at ¶¶ 9.3-9.5 (finding Senegalese petitioners within France's jurisdiction when they relied on French legislation for their pension rights).

<sup>46</sup> See *Banković*, *supra* note \_\_\_, at 75 (“The Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.”). To be fair, the Court somewhat unfairly recharacterized the petitioners' arguments in this regard. See *infra* text accompanying note \_\_\_ (setting forth petitioners' arguments).

attributable to a state (e.g., a diminution of foreign aid) is insufficient to trigger that state's human rights obligations abroad. Because these cases involve state action that is essentially local (such as a decision to extradite an individual abroad), they are of a different order than the more contentious situations involving state agents acting overseas.

## 2. Consular Actions

There is also a discrete set of cases challenging the actions of diplomats and other consular representatives operating abroad.<sup>47</sup> Many of these decisions turn on the right in question (e.g., the right to return to one's country, which inevitably applies beyond national territory) as well as the fact that the transaction in question (e.g., the re-issuance of a passport) is within the exclusive control or authority of the state representatives.<sup>48</sup>

## 3. Occupation & Control of Territory

Turning to situations that involve a state's extraterritorial conduct *stricto sensu*, the easiest scenarios are those in which one state exercises plenary control and authority over physical territory within the borders of another state. Although this can occur when one state exercises effective control over an area with the "consent, invitation or acquiescence of the government of that territory,"<sup>49</sup> the classic such scenario is one of occupation, when an occupying power—having removed or displaced the local authorities—is under a duty to maintain order and to provide for basic needs of the local populace until some indigenous civil authority can resume

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<sup>47</sup> See *Montero v. Uruguay*, HRC, Comm. No. 106/1981, U.N. Doc. CCPR/C/OP/2, (1990). Uruguay had failed to reissue the applicant's passport in Germany. The HRC found the claim to be admissible on the following reasoning:

The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him "to leave any country including his own", as required by article 12(2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, it imposed obligations both on the State of residence and on the State of nationality and that, therefore, article 2 (1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.

*Id.* at ¶ 5 (finding the confiscation of a passport of a Uruguayan citizen by the Uruguayan consulate in Germany to be a violation of the right to leave any country, including her own (Article 12(2))).

<sup>48</sup> See *W.M. v. Denmark*, App. No. 17392/90, EComm'nHR (14 October 1993), at ¶ 1 ("authorized agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged.") (unpubl. op.); *Lichtensztein v. Uruguay*, HRC, Comm. No. 77/1980 (31 Mar. 1983); *Dixit v. Australia*, HRC, U.N. Doc CCPR/C/77/D/978/2001 (28 April 2003) (allegations regarding discriminatory acts of immigration officials deemed inadmissible for failure to exhaust local remedies).

<sup>49</sup> *Banković*, *supra* note \_\_\_, at ¶ 71. In *Al-Skeini*, the UK Court of Appeals somewhat inexplicably held that that human rights obligations should not apply extraterritorially when the foreign actor is present without the consent of the territorial state, because such application might result in a violation of the territorial state's sovereignty. *Case of Al-Skeini & Others v. The United Kingdom*, App. No. 55721/07, Judgment (July 7, 2011), at ¶ 80 (discussing the holding of the UK Court of Appeal). This privileging of the sovereign right to non-interference of the territorial state over the human rights of the victims has not been widely shared beyond these two judgments.

those responsibilities.<sup>50</sup> These extraterritorial obligations can exist even when actual authority is exercised by a local administration under the control of the foreign state.<sup>51</sup> The International Court of Justice (ICJ) confronted a *de facto* occupation scenario in the *Armed Activities* case, wherein it found Uganda liable not only for abuses by its own troops but also for failing to protect the inhabitants from abuses by violent non-state actors not under Uganda's authority.<sup>52</sup> Inversely, enforcement bodies will effectively let states off the hook in situations in which they do not exercise control or authority on their own territories as a result of foreign occupation.<sup>53</sup>

It is often assumed the occupier bears responsibility for securing the entire range of substantive rights in the territory in question,<sup>54</sup> especially during prolonged occupations.<sup>55</sup> Placing human

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<sup>50</sup> EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 105 (1993) (describing the Fourth Geneva Convention as "a bill of rights" for the occupied population). In *Al-Skeini*, however, the United Kingdom conceded that the region in question was within British military responsibility; nonetheless, it argued that it did not have sufficient troops or resources on the ground to exercise effective control over the territory in question or the local civilian administration. *Al-Skeini*, *supra* note \_\_\_, at ¶ 112. It also conceded jurisdiction over British-run prison facilities in Iraq, but not over any actions undertaken in the military vehicle transporting detainees to those facilities. *Id.* at ¶ 118.

<sup>51</sup> In *Loizidou*, Turkey argued that the acts in question were attributable to an autonomous local administration. The Court rejected this, however, by reasoning:

when as a consequence of military action—whether lawful or unlawful—[a Contracting State] exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

*Loizidou*, *supra* note \_\_\_, at ¶ 69. See also *Cyprus v. Turkey*, ECHR, App. No. 25781/94, Judgment (10 May 2001) at ¶ 77 ("Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the acts of its own soldiers or officials ... [b]ut must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.").

<sup>52</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, ICJ Rep. 2005, 179 (19 Dec. 2005).

<sup>53</sup> Concluding Observations of the Human Rights Committee: Cyprus, U.N. Doc. CCPR/C/79/Add. 88 (6 Aug. 1998), at ¶ 3 ("the State party, as a consequence of events that occurred in 1974 and resulted in the occupation of part of the territory of Cyprus, is still not in a position to exercise control over all of its territory and consequently cannot ensure the application of the Covenant in areas not under its jurisdiction."). This may also occur in situations in which a state dissolves into constitutive parts that exercise only tenuous control over parts of their newly-acquired territory. See, e.g., Concluding Observations of the Human Rights Committee, Bosnia and Herzegovina, U.N. Doc. CCPR/C/79/Add.14 (1992), at ¶¶ 4-5 (noting with approval that while Bosnia-Herzegovina did not exercise "factual and effective control" over its entire territory, it nonetheless considered itself legally responsible for all parts of its territory).

<sup>54</sup> *Cyprus v. Turkey*, *supra* note \_\_\_, at ¶ 77 (because Turkey had effective control over Northern Cyprus, and because its control was plenary, it was obliged to secure the entire range of substantive Convention Rights: ... "Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights ... and ... violations of those rights are imputable to Turkey."). The ECHR invalidated Turkey's efforts to limit the reach of the European Convention's enforcement machinery to "the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied." See *Loizidou*, *supra* note \_\_\_, at ¶¶ 65-89.

<sup>55</sup> See *Legal Consequences*, *supra* note \_\_\_, at ¶¶ 107-113 (considering the extraterritoriality of the ICCPR, the ICESCR, and the CRC). In the *Wall* case, the ICJ cited concluding observations of the HRC taking note of "the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli forces therein" and concluded that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." *Id.* at ¶ 110. The situation involving Israel and the Occupied Territories is obviously *sui generis* and may not be susceptible to

rights obligations on an occupying power is complicated by the general proposition of occupation law, termed the “conservationist principle,”<sup>56</sup> that local law and institutions should be preserved<sup>57</sup> except insofar as they inhibit mission accomplishment, undermine order and security, interfere with the occupying power’s ability to adhere to other IHL commitments, or—increasingly—when local laws or institutions themselves violate international human rights protections.<sup>58</sup> The earlier account of the legislative history of the ICCPR reveals this paradox. The phenomenon of occupation was at the forefront of delegates’ minds in the 1950s when the ICCPR was being drafted, and the United States in particular was acutely concerned about assuming an obligation to exercise prescriptive jurisdiction in the areas that it occupied. That said, in modern times, the resonance of this aspect of the Covenant’s legislative history has diminished considerably, and adjudicative bodies are comfortable with the general proposition that areas under occupation fall within a state’s “jurisdiction” for the purpose of applying that state’s human rights obligations extraterritorially.

Adjudicative and quasi-adjudicative bodies have applied this territorial approach to other scenarios that fall short of full occupation but still involve *de facto* control—lawful or unlawful—of some physical domain within the borders of another state. Such responsibility will lie where there is “overall control” even if the state party does not exercise detailed “control over the policies and actions of the authorities in the area situated outside its national territory.”<sup>59</sup> This includes application to peacekeepers, who are assigned to a particular territory but who remain the responsibility of the troop-contributing state to the extent that the nationality state has the ability to ensure that its troops respect the rights of the local populace.<sup>60</sup> This rationale has also applied to

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easy extrapolation to other circumstances. Moreover, Israel is subject to disproportionate attention in human rights bodies. Nonetheless, the HRC’s conclusion is notable: “in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories ... for all conduct by the State party’s authorities or agents in those territories affecting the enjoyment of rights enshrined in the Covenant.” Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/ISR/CO/3 (29 July 2010), at ¶ 5.

<sup>56</sup> See generally Gregory H. Fox, *Transformative Occupation and the Unilateralist Impulse*, 94 INT’L REV. OF THE RED CROSS 237 (Spring 2012); *id.* at 256-8 (noting tension between states’ extraterritorial human rights obligations and the conservationist principle of occupation law).

<sup>57</sup> For example, Article 43 of the Hague Regulation provides that “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Regulations Respecting the Laws and Customs of War on Land, Annex to Convention [IV] Respecting the Laws and Customs of War on Land, 18 Oct. 1907. See also Article 64, Geneva Convention Relative to the Treatment of Civilian Persons in Time of War (GC IV) (August 12, 1949), T.I.A.S. 3365.

<sup>58</sup> See BENVENISTI, *supra* note \_\_\_, at 92 (finding “an obligation not to enforce local norms that are incompatible with the obligations to protect the human rights of the occupied population.”).

<sup>59</sup> *Issa and Others v. Turkey*, App. No. 31821/96 (16 Nov. 2004), at ¶ 70.

<sup>60</sup> See Concluding Observations of the Human Rights Committee, Belgium, U.N. Doc. CCPR/CO/81/BEL (8 Dec. 1998), at ¶ 6 (stating that the Covenant automatically applies whenever a party “exercises power or effective control over a person outside its territory ... such as forces constituting a national contingent assigned to an international peacekeeping or peace enforcement operation.”); Concluding Observations of the Human Rights Committee, Germany, U.N. Doc. CCPR/CO/80/DEU/Add.1 (4 Nov. 2005) (noting with approval Germany’s assurances that “[w]herever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.”). This position has not been accepted by all troop-contributing states. See Concluding Observations of the Human Rights Committee: Netherlands, U.N. Doc. CCPR/CO/72/NET (27 Aug. 2001), at ¶ 8;

situations in which the state exercises authority over more discrete venues, such as prisons<sup>61</sup> or vessels,<sup>62</sup> including vessels flying the flag of other nations.<sup>63</sup> In fact, some of the cases challenging the acts of diplomatic or consular officials with respect to individuals abroad can be assimilated to this more localized territorial theory. As the spatial unit of analysis becomes smaller and smaller, however, the control-over territory exception begins to resemble, and eventually collapse into, a test hinging the state's exercise of control over persons—both its agents and the victims.<sup>64</sup>

#### 4. State Control and Authority over Persons

Arguably, a strict application of the territorial control thesis was destined to disappoint in light of the simple fact that states are capable of violating the rights of individuals abroad without fully controlling the territory or situs on which those violations occur. The HRC was confronted in the late 1970s with a set of cross-border abduction cases that led to the development of a state-agent-authority or control-of-persons test. In these snatch-and-grab operations, the HRC held Uruguay to its human rights obligations when its authorities crossed international borders in pursuit of individuals and forcibly brought them back into national territory.<sup>65</sup> Because the

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Replies of the Government of the Netherlands to the Concerns Expressed by the Human Rights Committee, U.N. Doc. CCPR/CO/72/NET/Add.1 (9 April 2003), at ¶ 19 (“[t]he Government disagrees with the Committee’s suggestion that the provisions of the [ICCPR] are applicable to the conduct of Dutch blue helmets in Srebrenica. ... It goes without saying that the citizens of Srebrenica, vis-à-vis the Netherlands, do not come within the scope of [Article 2]”).

<sup>61</sup> *Al-Saadoon*, *supra* note \_\_\_, at ¶¶ 79-88 (treating two Iraqi nationals detained in British-controlled military prisons in Iraq as within the jurisdiction of the United Kingdom notwithstanding arguments that the United Kingdom was not exercising any public powers through the effective control over territory); *Al-Jedda v. the United Kingdom*, ECHR, Judgment, App. No. 27021/08 (7 July 2011). In *Al-Jedda*, the United Kingdom did not advance the extraterritoriality argument; rather, it argued that the petitioner was under the jurisdiction of the United Nations, since British troops were operating as part of a multinational force in Iraq. The Court held that because the petitioner was detained in a facility controlled exclusively by British soldiers, he was within the United Kingdom’s jurisdiction. *Id.* at ¶ 85.

<sup>62</sup> *Öcalan v. Turkey*, ECHR, Decision on Admissibility, App. No. 46221/99 (14 Dec. 2000). In *Öcalan*, the applicant was arrested by Turkish officials while boarding a plane in Nairobi. The strength of this precedent is somewhat diminished by the fact that Turkey did not raise objections as the court’s *ratione loci* during the admissibility phase of the proceedings.

<sup>63</sup> *Medvedyev and Others v. France* [GC], ECHR, Judgment, App. No. 3394/03, § 67 (29 Mar. 2010) (finding applicants within French jurisdiction by virtue of the exercise by French agents of *de facto* “full and exclusive control” over a ship and its crew from the time of its interception in international waters “in a continuous and uninterrupted manner”).

<sup>64</sup> *See, e.g., Al-Skeini*, *supra* note \_\_\_, at ¶ 136 (“What is decisive in such cases is the exercise of physical power and control over the person in question.”). Indeed, in his separate opinion in *Al-Skeini*, Judge Rozakis argued that the state agent and control test should actually be considered a corollary of the territorial control test. *Id.* at Concurring Opinion of Judge Rozakis.

<sup>65</sup> *Lopez-Burgos*, *supra* note \_\_\_; *Celiberti de Casariego v. Uruguay*, Comm. No. 56/1979, U.N. Doc. CCPR/C/13/D/56/1979 (1981) (finding the abduction of Uruguayan citizens by Uruguayan agents in Brazil to be a violation of the applicants’ rights). In *Lopez-Burgos*, the HRC wrote:

Article 2(1) places an obligation upon a State party to respect and to ensure rights ... but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. ... [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a

alleged victim was usually a citizen of the state seeking custody, these cases are susceptible to an alternative explanation premised on nationality; however, the applicable reasoning does not necessarily confine itself to such facts.<sup>66</sup> Moreover, the HRC made clear in General Comment No. 15 that the ICCPR's protections extend beyond state party nationals, foreclosing any analogy to social compact theories that might limit states' human rights obligations to their own citizens or subjects.<sup>67</sup> The HRC later ratified the control-of-persons standard in General Comment No. 31:

[A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. ... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained...<sup>68</sup>

Applying this concept of agent control or authority over the person is most easily applied in standard custodial situations, such as prisons,<sup>69</sup> which can also be more easily analogized to the control of territory. This rationale is also regularly invoked, however, in situations in which the

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State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

*Id.* at ¶ 12.3. For a more modern abduction case, see *V.P. Domukovsky et al. v. Georgia*, HRC, Comm. No. 623, 624, 626, 627/1995, U.N. Doc. CCPR/C/62/D/623, 624, 626, 627/1995 (29 May 1998) (Georgia violated applicants' rights when it abducted them from Azerbaijan, which had refused extradition); *Öcalan v. Turkey*, ECHR [GC], Judgment, App. No. 46221/99, (DATE), at ¶ 91 ("directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory.").

<sup>66</sup> The separate opinion of Christian Tomuschat in *Lopez-Burgos* could be so interpreted:

[t]he formula ["within its territory"] was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. ... Never was it envisaged ... to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2(1), the events which took place outside Uruguay come within the purview of the Covenant.

Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure, *Lopez-Burgos*, *supra* note \_\_\_\_.

<sup>67</sup> Human Rights Committee, General Comment No. 15 (11 Apr. 1986), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) ("the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens" except insofar as a right is applicable only to citizens, such as the right to vote (Article 25)).

<sup>68</sup> General Comment No. 31, *supra* note \_\_\_\_, at ¶ 10.

<sup>69</sup> Indeed, in the domestic *Al-Skeini* proceedings, the U.K. Divisional Court found that military operations in the field did not fall within the United Kingdom's jurisdiction, but the custodial deaths did—a point later conceded by the government. *Al-Skeini*, *supra* note \_\_\_\_, at ¶ 118.



individual is in the full custody of the state's agents, even if not detained in a formal facility.<sup>70</sup> This state-agent-authority theory becomes more fraught, however, when remote conduct is at issue, such when a state harms an individual through extraterritorial targeting decisions involving lethal force without ever exercising physical custody of the victim.

The first human rights body to confront this hard case was the Inter-American Commission on Human Rights in the form of a challenge to the Cuban Air Force's downing of small civil aircraft operated by the Brothers to the Rescue in international airspace.<sup>71</sup> Without the benefit of much in the way of prior precedent, the Commission proved remarkably prescient in articulating a theory of power and authority over the victims, notwithstanding that the victims were never in the actual custody of Cuban personnel:

The circumstance that the facts occurred outside the Cuban jurisdiction does not restrict nor limit the Commission's competent authority *ratione loci*, for, as has already been indicated, when agents of a State, whether they be military or civil, exercise power and authority over persons located outside the national territory, its obligation to respect human rights, in this case the rights recognized in the American Declaration, continues.<sup>72</sup>

Presumably, this reasoning could apply to a whole range of remote extraterritorial killings.

Nonetheless, the ECHR rejected the Commission's approach in the "Brothers to the Rescue" case in the controversial *Banković* case, involving NATO airstrikes on a television station in Serbia during the 1999 Operation Allied Force.<sup>73</sup> Petitioners argued that jurisdiction existed on a number of grounds: an "effects" test based on actions initiated within the territories of the respondent states but producing effects in the former Yugoslavia; a control-of-territory test premised on NATO's exclusive control of the airspace over Belgrade; and the proportional application of human rights obligations with reference to the degree of power exercised over the individual victims. The respondent governments in turn argued that states have human rights obligations only toward individuals owing some sort of allegiance to the State or in some form of "structured relationship existing over a period of time."<sup>74</sup>

The ECHR adopted a largely territorial approach to the Convention and declared the claims inadmissible owing to the fact that the extraterritorial act in question did not bring the claimants into the jurisdiction of the respondent states.<sup>75</sup> In so holding, the Court made little of several other cases involving Turkey (*Loizidou*, *Issa* and *Öcalan*) that were premised upon the

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<sup>70</sup> *Issa*, *supra* note \_\_\_\_, at ¶¶ 55, 74-75 (indicating that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them).

<sup>71</sup> *Armando Alejandro, Jr. et al. v. Cuba*, IAComm'nHR, Report No. 86/99, Case No. 11,589 (Sept. 29, 1999). Cuba did not contest the case, so the Inter-American Commission's reasoning does not benefit from the state's views.

<sup>72</sup> *Id.* at ¶ 25.

<sup>73</sup> *Banković and Others v. Belgium and Others*, Adm. Decision, App. No. 52207/99 (12 Dec. 2001).

<sup>74</sup> *Id.* at ¶¶ 30-53 (setting forth parties' arguments and counter-arguments).

<sup>75</sup> *Banković*, *supra* note \_\_\_\_, at ¶¶ 75, 81. Indeed, the ECHR also saw the potential for a clash of authority and indicated that any NATO obligations would be inferior and subordinated to the obligations of the territorial state. *Id.* at ¶¶ 59-60.

extraterritorial actions of Turkish state agents. These cases could be distinguished because, although they had already been deemed admissible, the respondent state had either not yet challenged admissibility or the merits were still pending.<sup>76</sup> The ECHR also justified departing from this line of precedent with reference to the essentially regional character of the European Convention. So, in the Cyprus line of cases, a finding that Turkey's obligations did not apply extraterritorially would have denied human rights protections to individuals who would normally have enjoyed them and left what amounted to a rights void. By contrast, *Banković* involved harm to citizens of Serbia—which at the time fell outside the *espace juridique* of the European Convention—who had no history or expectation of protection from the Convention.<sup>77</sup> This regional approach to the extraterritoriality question is unique to the ECHR and has been largely abandoned in its more recent jurisprudence.<sup>78</sup>

It cannot be gainsaid that the outcome in *Banković* may have been motivated by a number of extra-legal concerns, including a devotion to the humanitarian impulses behind the Operation, which was launched in order to halt and prevent egregious violations of human rights. Indeed, the respondent states argued that asserting jurisdiction over the facts at bar would discourage states from contributing to such missions.<sup>79</sup> Moreover, *Banković* was decided after 9/11 and just after the initiation of Operation Enduring Freedom, which may also have heightened the ECHR's sensitivities to assigning human rights obligations in extraterritorial armed conflict situations.<sup>80</sup>

Although *Banković* threatened to significantly curtail the extraterritorial reach of the European Convention, subsequent cases have all but limited it to its facts.<sup>81</sup> *Issa v. Turkey*, for example, involved the abduction and extrajudicial killing of Iraqi shepherds, allegedly by Turkish forces operating in northern Iraq—another state outside the *espace juridique* of the European Convention.<sup>82</sup> The Court confirmed that:

According to the relevant principles of international law, a State's responsibility may be engaged where, as a consequence of military action—whether lawful or unlawful—that State in practice exercises effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights

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<sup>76</sup> *Banković*, *supra* note \_\_\_, at ¶ 81.

<sup>77</sup> *Banković*, *supra* note \_\_\_, at ¶ 80 (noting that unlike Cyprus, the former Yugoslavia had not yet ratified the European Convention such that “the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.”).

<sup>78</sup> A regrettable whiff of relativity can be sensed in some of the decisional language invoking this concept of regionalism, which questions the propriety of imposing “European values” on states outside of the ECHR system.

<sup>79</sup> *Banković*, *supra* note \_\_\_, at ¶ 43.

<sup>80</sup> Indeed, in a speech at the time, the President of the Court stated: “The European Convention should to be applied in such a way as to prevent States from taking reasonable and proportionate action to defend democracy and the rule of law.” Quoted in Lawson, *supra* note \_\_\_, at 116.

<sup>81</sup> See McGoldrick, *supra* note \_\_\_, at 41 (arguing that *Banković* was a crisis case of limited precedential value). Indeed, several scholars have argued that the Court should have reached the merits in *Banković*, rather than avoid the facts with an admissibility ruling, and could have exonerated NATO on the basis of IHL principles of military necessity and proportionality as well as the application of a margin of appreciation. See, e.g., Lawson, *supra* note \_\_\_, at 108.

<sup>82</sup> *Issa and Others v. Turkey*, ECHR, Judgment, App. No. 31821/96 (30 Mar. 2005). Turkey was ultimately exonerated, because the petitioners could not prove that the acts in question were committed by Turkish troops. *Id.* at ¶ 81.

and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration. It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.<sup>83</sup>

Looking to the HRC's Uruguayan line of cases, the ECHR held that "the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."<sup>84</sup> Likewise, in *Öcalan v. Turkey*, another cross-border arrest case, the applicant—Kurdish Workers' Party (PKK) leader Abdullah Öcalan—was arrested in Kenya by Turkish security services. The ECHR ruled that as soon as he was transferred from Kenyan to Turkish custody, the individual in question was under "effective Turkish authority and control and was therefore brought within the 'jurisdiction' of that State."<sup>85</sup> In *Medvedyev*, the ECHR offered another somewhat garbled way to distinguish *Banković* when it noted that the primarily territorial notion of jurisdiction "excluded situations, however, where—as in the *Banković* case—what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a 'cause-and-effect' notion of jurisdiction."<sup>86</sup>

*Issa and Öcalan* involved victims in the custody of state agents. Even more telling, *Pad and Others v. Turkey* was brought by the families of several Iranian individuals killed by fire from a Turkish helicopter patrolling the border. That the facts were unclear as to whether the events in question occurred on Turkish or Iranian soil was of no moment since "the Court considers that it is not required to determine the exact location of the impugned events, given that the Government has already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives..."<sup>87</sup> The causal role of the state in the rights violation proved relevant in *Pad*'s finding that the victims fell within the state's jurisdiction as compared to *Medvedyev*'s rejection of the relevance of causality.

The impact of *Banković* diminished even further once *Al-Skeini v. the United Kingdom* came before the ECHR.<sup>88</sup> In the domestic incarnation of *Al-Skeini*, the British lower courts adopted the *Banković* reasoning to reject claims by Iraqi citizens who were fatally shot by British soldiers

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<sup>83</sup> *Id.* at ¶ 69-70 (citations removed). See also *Isaak et al. v. Turkey*, ECHR, Judgment, App. No. 44587/98 (28 Sept. 2006), at ¶ (b)(i)-(ii) (finding Turkey responsible for acts committed in a U.N. buffer zone by agents of a local administration under its control).

<sup>84</sup> *Issa*, *supra* note \_\_\_\_, at ¶ 71.

<sup>85</sup> *Öcalan v. Turkey*, ECHR, Judgment, App. 46221/99 (12 Mar. 2003), at ¶ 93. On the merits, the ECHR determined that the arrest was not unlawful under the Convention. *Id.* at ¶ 228. The Grand Chamber affirmed this holding. See *Öcalan*, *supra* note \_\_\_\_.

<sup>86</sup> *Medvedyev*, *supra* note \_\_\_\_, at ¶ 64.

<sup>87</sup> *Pad & Others v. Turkey*, ECHR, Decision, App. No. 60167/00 (28 June 2007), at ¶¶ 53-54. Similarly, the Court declared the petitions in *Xhavara* to be inadmissible for failure to exhaust local remedies, but also made clear that it could exercise jurisdiction over a failure by Italy to conduct a proper investigation of an accident on the high seas involving an Italian warship. *Xhavara and Others v. Italy and Albania*, ECHR, App. No. 39473/98, Admissibility Decision (11 Jan. 2007).

<sup>88</sup> *Al-Skeini*, *supra* note \_\_\_\_.

during patrols and search-and-arrest operations in Iraq.<sup>89</sup> When this case reached the ECHR (with Article 13 claims alleging that the U.K. failed to conduct an appropriate investigation as opposed to claims under Article 2 alleging violations of the right to life), a newly constituted chamber of the Court largely rejected the *Banković* reasoning. Instead, the ECHR held:

the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.<sup>90</sup>

At least part of this finding hinges on the fact that the United Kingdom voluntarily undertook responsibility for the maintenance of security in the region following the removal from power of the Ba'ath regime and prior to the establishment of an Interim Government.<sup>91</sup> On balance, this affirmative assumption of responsibility coupled with clear causality and the close proximity between the victims and British agents established the “jurisdictional link” necessary to satisfy Article 1 of the European Convention.<sup>92</sup>

In the meantime, the Inter-American Commission was confronted with facts similar to those at issue in *Banković* in an inter-state claim brought by Ecuador against Colombia on behalf of an Ecuadoran victim of Operation Phoenix, during which the Colombian Air Forces bombed a FARC camp located within Ecuador.<sup>93</sup> The aerial bombing was followed by a ground incursion in which some of the wounded and killed were removed.<sup>94</sup> Colombia contested jurisdiction on the ground that Operation Phoenix did not entail military occupation or control over Ecuadoran territory or armed groups therein.<sup>95</sup> Acknowledging *Banković*,<sup>96</sup> the Commission determined that:

the exercise of authority over persons by agents of a State even if not acting within their territory, without necessarily requiring the existence of a formal, structured and prolonged legal relation in terms of time to raise the responsibility of a State for acts committed by its agents abroad. At the time of examining the scope of the American Convention’s jurisdiction, it is necessary to determine

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<sup>89</sup> For example, Lord Brown of the House of Lords reasoned that “it would stretch to breaking point the concept of jurisdiction extending extra-territorially to those subject to a state’s ‘authority and control’. ... [E]xcept where a state really does have effective control of territory it cannot hope to secure Convention rights within that territory.” *Id.* at ¶¶ 127-8.

<sup>90</sup> *Al-Skeini*, *supra* note \_\_\_, at ¶ 149.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at ¶ 150.

<sup>93</sup> Report No. 112/10, Inter-State Petition IP-02, Admissibility, *Franklin Guillermo Aisalla Molina, Ecuador – Colombia*, Inter-Am.C.H.R., OEA/Ser.L/V/II.140 Doc. 10, at ¶ 27 (2010).

<sup>94</sup> *Id.* at ¶¶ 32-33.

<sup>95</sup> *Id.* at ¶¶ 82-3.

<sup>96</sup> *Id.* at ¶ 95.

whether there is a causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.<sup>97</sup>

The Commission adopted a calibrated approach when it held:

[This] does not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived from a State's territorial activities, including all the range of obligations with respect to persons who are under its jurisdiction for the (entire) time the control by its agents lasted. Instead, the obligation does arise in the period of time that agents of a State interfere in the lives of persons who are on the territory of the other State, for those agents to respect their rights, in particular, their right to life and humane treatment.<sup>98</sup>

For the purposes of admissibility, the Commission determined that Colombia exercised extraterritorial jurisdiction over the area attacked.<sup>99</sup>

In light of the above, it remains to be seen how the ECHR will address scenarios that fall between the facts of *Banković* (wherein state agents are entirely remote from the victim in question, exercise little to no territorial control, but can still cause harm through air superiority or the deployment of remote weaponry) and those of *Al-Skeini* (wherein the state voluntarily assumed some measure of control over a territory and a population in a situation of quasi-occupation). At a minimum, *Issa, Pad*, and *Al-Skeini* lay the groundwork for a revisiting of *Banković*'s reliance on a territorial control as a precondition to hold a state responsible for the commission of remote extrajudicial killings. Obviously, as the state and its agents and instrumentalities become more and more remote, the jurisdictional link between the state and the victim could become too attenuated to extend the obligations of the European Convention. However, the paradox of allowing a state to avoid its human rights obligations by remaining distant in its choice of means and methods of war will not be lost on human rights adjudicators.<sup>100</sup> Arguably, the operator of a remotely piloted vehicle exercises the same degree of control—if not more so—over his or her target as the British troops exercised over their victims in *Issa*.

## 5. Gestalt Approaches

The human rights bodies have evinced a tendency to proceed case-by-case, in keeping with the *non ultra petita* rule, rather advance more generally applicable principles. Although this iterative approach to a new doctrinal area is common, in this context, it has generated an academic critique that the human rights bodies, and the ECHR in particular, have failed to create a

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<sup>97</sup> *Id.* at ¶ 99.

<sup>98</sup> *Id.* at ¶ 100.

<sup>99</sup> *Id.* at ¶ 103. The case was disposed of by a friendly settlement.

<sup>100</sup> Indeed, in an effort to have the ECHR follow *Banković*, the United Kingdom in *Al-Skeini* argued that the law should not distinguish between “a death resulting from a bombing and one resulting from a shooting in the course of a ground operation. ... There was no basis for concluding that the applicability of the Convention should turn upon the particular activity that a soldier was engaged in at the time of the alleged violation, whether street patrol, ground offensive or aerial bombardment.” *Al-Skeini*, *supra* note \_\_, at ¶¶ 116-7.

coherent doctrinal framework for determining the extraterritorial reach of state' human rights obligations.<sup>101</sup> Accordingly, particular judges and commentators have advanced more gestalt approaches. For example, Judge Bonello in *Al-Skeini* argued in his separate opinion that events should fall within a state "jurisdiction" whenever the state is capable of performing the basic obligations of a functional human rights regime: refraining from violations, investigating complaints of abuses, punishing responsible individuals, and compensating victims.<sup>102</sup> Conversely, territory, individuals, or events would fall outside the state's jurisdiction in situations in which a state is not in a position to respect or to ensure particular rights because it could not control the rights abusers, could not investigate complaints, could not punish responsible individuals, or could not compensate the victims. This capacity-based analysis ensures that human rights obligations are not "interpreted in such a way as to impose an impossible or disproportionate burden" on states.<sup>103</sup> Thus:

It is quite possible to envisage situations in which a Contracting State, in its role as an occupying power, has well within its authority the power not to commit torture or extra-judicial killings, to punish those who commit them and to compensate the victims—but at the same time that Contracting State does not have the extent of authority and control required to ensure to all persons the right to education or the right to free and fair elections: those fundamental rights it can enforce would fall squarely within its jurisdiction, those it cannot, on the wrong side of the bright line.<sup>104</sup>

In other words, obligations should be commensurate with capacity. The theory that causation and capacity create the necessary "jurisdictional link" would more easily govern remote targeting decisions that are clearly attributable to the state but that might not entail any exercise of physical control over the victims. In addition, rather than premising responsibility on a theory of control over the individual analogized from the control-over-territory precedent, a system could be devised that hinges on the "relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever the violations occurred"<sup>105</sup> and the fact that the state exercises causal control over the "facts and circumstances that allegedly constitute a violation of a human rights."<sup>106</sup>

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<sup>101</sup> Marko Milanovic, [REDACTED], OPINIOJURIS, <http://opiniojuris.org/2011/12/02/extraterritorial-application-of-human-rights-treaties-an-overview/> (describing the ECHR's jurisprudence in this area as "problematic, suffering from rampant casuistry and conceptual chaos."); MILANOVIC, *supra* note \_\_\_, at 4 (critiquing the ECHR of generating "a jurisprudence of (at times quite unprincipled) compromise, caused mostly by the Court's understandable desire to avoid the merits of legally and politically extremely difficult cases by relying on the preliminary issue of extraterritorial application" as a judicial avoidance technique).

<sup>102</sup> *Al-Skeini*, Concurring Opinion of Judge Bonello, *supra* note \_\_\_, at ¶¶ 10-11 ("a State has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control.").

<sup>103</sup> *Ilaşcu*, *supra* note \_\_\_, at ¶ 332.

<sup>104</sup> *Al-Skeini*, *supra* note \_\_\_, at ¶ 32.

<sup>105</sup> Martin Scheinin, *Extraterritorial Effect of the International Covenant on Civil and Political Rights*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 73, 73 (Fons Coomans & Menno T. Kamminga Eds., 2004).

<sup>106</sup> *Id.* at 76 (emphasis in original).

Any more functional or calibrated theory of the extraterritorial application of human rights obligations will depend on a willingness to accept the divisibility of the human rights corpus—a corollary doctrinal dilemma that gave some decision-makers pause early on. There are two ways this corpus may be sliced: one approach focuses on the types of substantive rights that may—as a matter of logic, status, and practicality—apply extraterritorially. The second focuses on the types of state obligations (i.e., the duty to *respect* rights versus the duty to *ensure* or even to *promote* them) that may—also as a matter of logic and practicality—apply extraterritorially. It should be noted that the question is not whether the individuals who are being acted upon enjoy the entire corpus of human rights—they do. Rather, the question is: which state should be the guarantor of those rights? When a state acts on the territory of another sovereign, it may assume certain human rights obligations vis-à-vis the citizens and residents of that territory that apply in parallel with the extant obligations of the territorial state. Under other circumstances, such as total occupation, the foreign state may fully displace the territorial state as rights guarantor.

The early impulse of many human rights bodies was to insist upon the indivisibility of the corpus of human rights.<sup>107</sup> Indeed, in *Banković*, the ECHR resisted the applicants’ claims that rights should apply proportionately to the degree of control over the individuals exercised by the state.<sup>108</sup> This perspective was rights-promoting in that it guarded against efforts to rank order or even to divide and conquer rights. This insistence on unity, however, invited binary arguments in opposition to efforts to apply certain rights extraterritorially in circumstances in which it might be appropriate. Opponents need only raise the specter of a foreign state owing an obligation to promote the right to education, religion, or political participation when it acts abroad to undercut extraterritoriality arguments.

In the alternative, or in addition, the extraterritorial application of rights may be disaggregated with reference to the nature of the state’s obligation vis-à-vis the right rather than the nature of the substantive right itself. As discussed, human rights treaties articulate different types of obligations with respect to their enumerated rights. The obligation to “respect” a particular right creates a “duty of forbearance” and hinges on the state’s own conduct as manifested by the actions of its agents and instrumentalities.<sup>109</sup> Obligations to respect a right obliges the state to refrain from actions that would violate the right or impede its enjoyment. The obligation to “ensure” a right implies more positive obligations, including a duty to take positive steps toward the enjoyment of the right as well as to protect individuals from abuses of the right committed by third parties. The obligation to “fulfil” a right may require a state party to undertake an expenditure of resources to actively promote the enjoyment of the right and otherwise create the conditions necessary for the full enjoyment of the right. These latter types of obligations may be difficult, if not impossible, to realize extraterritorially in situations in which there is another sovereign with more direct and immediate control of the instrumentalities that would normally

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<sup>107</sup> The 2005 World Summit Outcome document encapsulates this: “all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing. ... [A]ll human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.” 2005 World Summit Outcome, U.N. Doc. A/RES/60/1 (24 Oct. 2005), § 121.

<sup>108</sup> *Banković*, *supra* note \_\_\_, at ¶ 75 (“the wording of Article 1 does not provide any support for the applicants’ suggestion that the positive obligation in Article 1 to secure ‘the rights and freedoms defined in Section I of this Convention’ can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question”).

<sup>109</sup> See NOWAK, *supra* note \_\_\_, at 37. See generally *id.* at 37-39 (discussing taxonomy of obligations).

ensure and promote those rights, such as schools, courts, etc. The obligation to respect a particular right, however, is always within the control of the state, even when it acts extraterritorially.<sup>110</sup> Accordingly, a proportional approach would place duties to respect rights on states on a lesser showing of territorial or physical control than duties to ensure rights. Human rights bodies are increasingly comfortable with the idea of a sliding scale of rights and obligations that hinges on the particular circumstances of the foreign state's presence and actions within the territorial state.<sup>111</sup> The greater the degree of presence, power, and control, the more obligations might apply.<sup>112</sup> And, extraterritorial obligations might apply to fundamental rights on a lesser showing of presence than to other rights. Such an approach maps nicely onto the taxonomy of scenarios set forth above. In particular, extraterritorial custodial cases are relatively easy; under those circumstances, the custodial state is entirely capable of protecting a number of rights that are implicated by such situations (e.g., the right to physical integrity and to be free from torture and other cruel, inhuman or degrading treatment; certain due process rights to fair notice and judicial review; and the right to equal protection and to be free from discrimination on invidious grounds). While these rights can be certainly guaranteed by the custodial state, it would be unreasonable to expect that state to accord the entire range of human rights to detainees as well as to other individuals within a foreign territory who occupy a different relationship with the foreign state. These individuals are no less rights bearing, but they must assert those rights against their national sovereign. Human rights bodies have proven themselves perhaps more comfortable assigning obligations to investigate extraterritorial rights violations when the state's responsibility for the violation itself is not at issue.<sup>113</sup> The downside of moving away from the idea of indivisibility is that it becomes necessary to determine the applicability of each and every right and obligation in the circumstances at bar.

## 6. Conclusion

Although this jurisprudence started with a simple presumption that human rights obligations are essentially territorial, over the years the recognized exceptions—borne of compelling fact patterns involving manifestly harmful extraterritorial state action in situations in which the state was perfectly capable of respecting the right in question—have proliferated. Like beads of mercury, these exceptions have coalesced into a generalized doctrine of extraterritorial application. The current state of the law would thus dictate that human rights obligations exist wherever a state exercises *de facto* authority or control over territory, individuals, or a

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<sup>110</sup> Marko Milanovic, *Foreign Surveillance and Human Rights, Part 3: Models of Extraterritorial Application*, EJIL:TALK!, <http://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application> (“The rationale for not limiting negative obligations is that states are *always* perfectly able of complying with them, since they remain in full control of their own organs and agents.”).

<sup>111</sup> *Ilaşcu and Others v. Moldova and Russia*, ECHR [GC], Judgment, Case No. 48787/99 (July 8, 2004), ¶ 313 (noting that human rights “obligations remain even where the exercise of the State’s authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take.”). *But see* MILANOVIC, *supra* note \_\_\_, at 107 (critiquing the Court in *Ilaşcu* for placing positive obligations on Moldova toward persons present in an area where it enjoys title but not control).

<sup>112</sup> *Al-Skeini*, *supra* note \_\_\_, at ¶ 137 (“It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’”) (citations removed).

<sup>113</sup> *See, e.g., Al-Skeini*, *supra* note \_\_\_ (involving the United Kingdom’s duty to investigate); *Khavara*, *supra* note \_\_\_ (involving Italy’s duty to investigate).



transaction and has the power to respect and ensure the enjoyment of rights and freedoms. The proposition that human rights obligations apply extraterritorially to situations of occupation and detention is close to categorical, with situations involving lesser territorial or personal control being subject to more of a case-by-case analysis that turns on the particular facts and the degree of control exercised. The state-agent-authority test is likewise easiest to apply in situations in which the putative victim was in detention or otherwise in the sole custody of the extraterritorial state. It remains more contested as the state becomes increasingly remote from the victim. Both tests can be assimilated under the aegis of a test premised on capacity: if the state has the capacity to both violate and rectify the violation of the right, then the obligation to respect that right applies extraterritorially. The United States' categorical position on extraterritoriality can be evaluated against this doctrinal backdrop.

#### D. The United States

Although not subject to the ECHR, or to any institution with the power to enforce its judgment or views against it, the United States does have treaty obligations requiring it to undertake periodic reporting and defend its policies and actions before human rights experts bodies, such as the HRC and the Committee Against Torture, and also to respond to individual petitions before the Inter-American Commission on Human Rights.<sup>114</sup> Most claims alleging that the United States has not adhered to its human rights obligations while acting extraterritorially involve situations of armed conflict in which deployed U.S. troops and other personnel have caused harm. In its filings in response to such claims before the various human rights bodies, the United States originally relied on the argument that these institutions lacked competence over factual scenarios governed by IHL as a function of their subject matter jurisdiction limitations. In any case, it has argued that its human rights obligations are suspended in armed conflict situations governed by IHL—the *lex specialis*. To the extent that United States addressed these issues at all, it did so only as a matter of “courtesy” rather than out of a sense of legal compulsion.<sup>115</sup> Since 1995 in the HRC, however, the United States has more expressly advanced the additional jurisdictional defense that its human rights obligations do not apply extraterritorially under any circumstances.

Even prior to the initiation of so-called Global War on Terror, the United States has been subject to claims premised on extraterritorial human rights obligations. Most importantly, the Inter-American Commission on Human Rights received several petitions against the United States involving operations in Haiti, Grenada, and Panama. By way of a jurisdictional defense in the *Coard* case—which involved allegations following the invasion of Grenada that the U.S. troops had mistreated individuals in detention and then manipulated the judicial system to deprive them

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<sup>114</sup> Although the United States has yet to recognize the contentious jurisdiction of the Inter-American Court of Human Rights, or—for that matter—the optional individual petition process of any human rights treaty body, the Inter-American Commission has mandatory quasi-adjudicatory jurisdiction over the United States' compliance with the American Declaration on the Rights and Duties of Man by virtue of the United States' membership in the OAS.

<sup>115</sup> Melish, *supra* note \_\_\_, at 240-41. *See also* Geneva 001769, *supra* note \_\_\_ (cable discussing U.S. presentation before the HRC affirming “the long-standing U.S. legal position that the Covenant does not apply to the conduct of a State Party outside of its territory” ... but nonetheless noting a willingness to engage in extensive dialogue about overseas military operations and renditions “as a courtesy”).

of a fair trial<sup>116</sup>—the United States argued that the impugned detentions were consistent with the applicable IHL, which the Commission had no mandate or expertise to apply.<sup>117</sup> The extraterritorial application *vel non* of the American Declaration, which contains no territorial or jurisdictional limitation,<sup>118</sup> was not briefed by the parties. Nonetheless, the Commission noted *sua sponte*:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with, but required by, the norms which pertain. ... Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state—usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.<sup>119</sup>

Following these early cases, the United States' detention program on the Guantánamo Bay Naval Base and its operations in Afghanistan and other theaters brought to the fore additional such claims. For example, lawyers representing individuals detained on Guantánamo sought precautionary measures (i.e., injunctive relief) from the Inter-American Commission. At the outset, the United States raised multiple jurisdictional arguments: that the Commission was without jurisdiction to issue precautionary measures against a state not party to the Inter-American Convention; that the Commission had no jurisdiction over claims governed by IHL,<sup>120</sup> which governs the capture and detention of enemy combatants in armed conflict; and that the

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<sup>116</sup> *Coard et al. v. the United States*, Inter-Am. Comm'n Hum. Rts., Report No. 109/99, Case No. 10.951 (29 Sept. 1999) (finding that the security detentions were lawful under IHL, but that the United States did not enable the petitioners to review of the legality of their detention with the least possible delay).

<sup>117</sup> *Id.* at ¶¶ 21, 35, 38, 66. See also *Disabled People's International et al. v. United States*, Inter-Am. Comm'n Hum. Rts., App. No. 9213, Adm. Dec. (22 Sept. 1987), at ¶ 1 (finding admissible a challenge, subsequently resolved by way of a friendly settlement, to the United States' bombing of a mental hospital in Grenada); *Sala et al. v. United States*, Inter-Am. Comm'n Hum. Rts., Report No. 31/93, Case No. 10,573, Adm. Dec. (14 Oct. 1993) (finding admissible claims of personal injury and death resulting from the 1989 military operation in Panama that resulted in the capture of General Manuel Noriega). None of these situations involved a finding that the United States exercised effective control of territory. See Douglass Cassel, *Extraterritorial Application of Inter-American Human Rights Instruments*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 175, 177 (Fons Coomans & Menno T. Kamminga Eds., 2004).

<sup>118</sup> See *supra* note \_\_\_\_\_. Nor was it expressly at issue in the case challenging the U.S. policy of interdicting and repatriating Haitians fleeing the Duvalier dictatorship. See *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

<sup>119</sup> *Coard*, *supra* note \_\_\_\_ at ¶ 37.

<sup>120</sup> See *Additional Response of the United States to Request for Precautionary Measures—Detainees in Guantánamo Bay, Cuba*, IAComm'nHR (15 July, 2002), available at <http://www.state.gov/s/l/38642.htm>; *Statement of the Delegation of the United States of America*, IAComm'nHR, Hearing on Precautionary Measures (20 Oct. 2003), available at <http://www.state.gov/s/l/2003/44385.htm>.

petitioners failed to exhaust local remedies.<sup>121</sup> In responding to the United States' *lex specialis* argument, the Commission adopted what amounts to an authority and control test to justify its exercise of jurisdiction:

where persons find themselves within the authority and control of a state and where a circumstance of armed conflict may be involved, their fundamental rights may be determined in part by reference to international humanitarian law as well as international human rights law. ... In short, no person, under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable rights.<sup>122</sup>

The precautionary measures imposed with respect to all the detainees were twice extended in 2005 and again in 2013 (the latter on the Commission's own initiative), although these have had little apparent force or effect on U.S. policy.<sup>123</sup> In an individual petition brought on behalf of an Algerian detainee, Djamel Ameziane, the Commission considered the petitioner to be within the United States' jurisdiction during three distinct phases: his capture in Pakistan, his temporary detention in a U.S. airbase in Kandahar, and his continued detention on Guantanamo. In so holding, the Commission reasoned that throughout this time period, the United States and its agents exercised exclusive physical power and control over the petitioner.<sup>124</sup>

This issue has arisen in the Committee Against Torture (CAT) with respect to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. In its Second Periodic Report, which was due in 2001 but filed in 2005, the United States provided extensive information regarding its overseas operations in Afghanistan and Iraq with little discussion of the extraterritorial application *vel non* of the Torture Convention.<sup>125</sup> Nonetheless, in its responses to questions from the CAT, the United States noted that many legal obligations within the treaty (such as the *non-refoulement* principle) do "not apply to activities undertaken outside of the 'territory under [the] jurisdiction' of the United States. The United States does not

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<sup>121</sup> See U.S. Submission to IACHR Regarding Detention and Treatment of Detainees (16 Dec. 2004), available at <http://www.state.gov/s/1/2004/78299.htm>.

<sup>122</sup> IAComm'nHR, Precautionary Measures in Guantánamo Bay, Cuba, No. 259/02 (13 Mar. 2002), available at <http://www1.umn.edu/humanrts/iachr/guantanamomeasures2002.html>; see also *id.* at note 7 ("The determination of a state's responsibility for violation of the international human rights of a particular individual turns not on that individual's nationality or presence within a particularly geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control."). The U.S. Supreme Court adopted similar reasoning when it concluded that, because the United States exercises complete jurisdiction and control over the base on Guantánamo, detainees there are entitled to constitutional rights to *habeas corpus*. *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>123</sup> Particularized precautionary measures were also obtained on behalf of two other detainees. See *Precautionary Measures Regarding Guantánamo*, <http://www.oas.org/en/iachr/pdl/decisions/GuantanamoMC.asp#MC25902>. In proceedings involving individual petitioners, the United States did not file always a substantive response. See, e.g., *Ameziane v. United States*, IAComm'nHR, Report No. 17/12, Petition P-900-08 (20 Mar. 2012), at ¶ 25. Nonetheless, in *Ameziane*, the Commission took note of the United States' position that the Commission lacks jurisdiction over detention operations on Guantanamo. *Id.*

<sup>124</sup> *Id.* at ¶¶ 30-33.

<sup>125</sup> See Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Report of States Parties due in 1999, U.N. Doc. CAT/C/48/Add.3 (29 June 2005).

accept the concept that ‘de facto control’ equates to territory under its jurisdiction.”<sup>126</sup> In its Concluding Observations, the CAT rejected the *lex specialis* argument and noted that the treaty applies to “all areas under the *de facto* effective control of the State Party, by whichever military or civil authorities such control is exercised.” It deemed “regrettable” the United States’ contrary views that the treaty applies only to states’ *de jure* territory.<sup>127</sup> In its combined Third, Fourth, and Fifth Report, the United States did not go into detail on the territorial scope of the treaty; it did, however, provide information on a range of offshore activities—such as overseas detention and intelligence operations—as if it had conceded the treaty’s extraterritorial application.<sup>128</sup>

Turning to the Human Rights Committee, in the United States’ first periodic submission to the HRC in 1994,<sup>129</sup> there was no mention of any territorial limitations, even though the Committee had already pronounced on several fact patterns involving extraterritorial conduct by states parties.<sup>130</sup> By the time of the HRC hearing, however, the United States was involved in military operations in Haiti, and a challenge had been lodged against the high-seas interdiction of Haitian refugees.<sup>131</sup> In its oral presentation, the United States delegation argued that the obligations of the treaty are limited to a party’s territory by virtue of the formulation of Article 2(1) and the intent of drafters.<sup>132</sup> In its Concluding Observations, the HRC took issue with this position and critiqued the United States’ refusal to provide any information on its overseas operations.<sup>133</sup>

<sup>126</sup> United States’ Response to the Questions Asked by the Committee Against Torture (5 May 2006), *available at* <http://www.state.gov/j/drl/rls/68561.htm>.

<sup>127</sup> Considerations of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States, U.N. Doc. CAT/C/USA/CO/2 (25 July 2006), at ¶ 15.

<sup>128</sup> Periodic Report of the United States of America to the United Nations Committee Against Torture (Third, Fourth, and Fifth Reports) (12 Aug. 2013), at ¶ 6 (“It should be noted that the report does not address the geographic scope of the Convention as a legal matter, although it does respond to related questions from the Committee in factual terms.”).

<sup>129</sup> Initial Report of the United States of America, U.N. Doc. CCPR/C/81/Add.4 (29 July 1994). All the United States’ human rights reports are available here: <http://www.state.gov/j/drl/rls/>. The United States ratified the ICCPR in 1992; its first Periodic Report was due in 1994 and was defended before the Committee the next year. The Second Periodic Report was due in 1998 and the Third was due in 2003; a combined Second and Third Report was not filed until 2005. Unfortunately, the filing of a joint report in the midst of intense scrutiny of the United States’ human rights record deprived observers of the benefit of any window into the evolution of the United States’ thinking in this regard. For a discussion of the HRC process and the Second and Third Report, see Colette Connor, *Recent Development: The United States’ Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 HARV. INT’L L. J. 509 (2008).

<sup>130</sup> See, e.g., *Lopez-Burgos*, *supra* note \_\_\_\_.

<sup>131</sup> See Ted Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995) (arguing that the ICCPR applies to U.S. actions in Haiti); *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (holding that state obligations under the United Nations Convention Relating to the Status of Refugees do not apply on the high seas).

<sup>132</sup> HRC, *Summary Record of the 1405<sup>th</sup> Meeting: United States of America*, U.N. Doc. CCPR/C/SR.1405 (24 April 1995), ¶ 20, *available at* [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/64b96f92ce046f74802566660059807b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/64b96f92ce046f74802566660059807b?Opendocument) (noting U.S. argument that “[t]he Covenant was not regarded as having extraterritorial application” because of the “dual requirement” of Article 2(1)).

<sup>133</sup> See U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. A/50/40 (Oct. 3, 1995), ¶ 284 (“The Committee does not share the view expressed by the Government [of the United States] that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that state’s territory.”).

In 2005, the United States filed its combined Second and Third Report (after being in arrears) in the HRC.<sup>134</sup> In this report, the United States offered its analysis of the territorial limitations of the ICCPR, including the conjunctive interpretation of Article 2(1), and concluded that:

[T]he obligations assumed by a State Party to the International Covenant on Civil and Political Rights apply only within the territory of the State Party.<sup>135</sup>

Because in its estimation the text was clear, the United States asserted that there was no need to resort to the *travaux préparatoires* as an interpretative device. Nonetheless, it argued that the records indicated that “within its territory” was included within Article 2(1) to “make clear that states would not be obligated to ensure the rights recognized therein outside their territories.”<sup>136</sup> In response to questions about the legal status of persons detained in Afghanistan, Guantánamo, Iraq, and elsewhere, the United States advanced *lex specialis* arguments to the effect that the “legal status and treatment of such persons is governed by the law of war.”<sup>137</sup> The HRC contested these claims in its Concluding Observations.<sup>138</sup> In its 2008 follow-up comments, the United States maintained its position that the ICCPR does not apply extraterritorially, but it did provide some of the information requested “as a courtesy” to the Committee, including on “matters outside the scope of the Covenant,” such as detention operations on Guantánamo and elsewhere.<sup>139</sup>

In its 2011 Fourth Periodic Report to the HRC,<sup>140</sup> the United States took note of the Concluding Observations of the HRC, including the recommendation that it “review its approach to the interpretation of the Covenant.”<sup>141</sup> It then proceeded to largely back off its prior position that international human rights law does not apply to situations governed by IHL. In particular, the United States averred:

With respect to the application of the Covenant and the international law of armed conflict (also referred to as international humanitarian law or “IHL”), the United States has not taken the position that the Covenant does not apply “in time of war.” Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application.<sup>142</sup>

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<sup>134</sup> U.N. Human Rights Comm., Third Periodic Reports of States Parties Due in 2003: United States of America, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005), Annex I.

<sup>135</sup> *Id.* at ¶ 109.

<sup>136</sup> *Id.* at ¶ 110.

<sup>137</sup> *Id.* at ¶ 130.

<sup>138</sup> Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, United States, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (18 Dec. 2006), ¶¶ 3, 10 (calling on the United States to “acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war”).

<sup>139</sup> U.N. Human Rights Comm., Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/USA/CO/3/REV.1/ADD.1 (Feb. 12, 2008), at 2-3.

<sup>140</sup> Fourth Period Report of the United States of American to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/USA/4 (22 May 2012).

<sup>141</sup> *See supra* note \_\_\_\_.

<sup>142</sup> Fourth Periodic Report, *supra* note \_\_\_\_, at ¶ 506.

The United States continued by noting that “typically” it is IHL that regulates the conduct of states in armed conflict situations, according to the doctrine of *lex specialis*. In the next breath, however, the U.S. submission stated:

In this context, it is important to bear in mind that international human rights law and the law of armed conflict are in many respects complementary and mutually reinforcing. These two bodies of law contain many similar protections [such as the prohibition against torture].<sup>143</sup>

Later, the submission noted that the choice of law question is context- and fact-specific:

Determining the international law rule that applies to a particular action taken by a government in the context of an armed conflict is a fact-specific determination, which cannot be easily generalized, and raises especially complex issues in the context of non-international armed conflicts occurring within a State’s own territory.<sup>144</sup>

The Fourth Periodic Report was not, by contrast, as forthcoming or progressive when it comes to the extraterritorial application of human rights obligations. After coyly acknowledging its prior position against extraterritoriality, the United States specifically took notice of three important legal sources setting forth the contrary view. The paragraph states in full:

The United States in its prior appearances before the Committee has articulated the position that article 2(1) would apply only to individuals who were both within the territory of a State Party and within that State Party’s jurisdiction. The United States is mindful that in General Comment 31 (2004) the Committee presented the view that “States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” The United States is also aware of the jurisprudence of the International Court of Justice (“ICJ”), which has found the ICCPR “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,” as well as positions taken by other States Parties.<sup>145</sup>

These passages suggest both a more relaxed understanding of the relationship between IHL and human rights law and an imperative to harmonize legal obligations when there is no direct contradiction between them. In addition, the submission suggests that it is the United States’ view that there may be aspects of a state’s conduct that are, in fact, governed by human rights law, even during situations of armed conflicts—all of which are taking place outside of United

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<sup>143</sup> *Id.* at ¶ 507.

<sup>144</sup> *Id.* at ¶ 507.

<sup>145</sup> *Id.* at ¶ 505.

States' territory. This implies the majority conflict-of-laws position that human rights law can be employed as an interpretive aid to add content to undefined terms in IHL, such as "judicial guarantees" and "humane treatment," or to expound upon treaty obligations, as in situations of occupation or detention when the occupying state exercises plenary power over territory or individuals. Although the United States also indicated a willingness to engage in further dialogue on these issues,<sup>146</sup> the United States declined to elaborate in response to the HRC's list of priority issues prepared in advance of its "constructive dialogue" with the Committee now scheduled for March 2014.<sup>147</sup>

### E. The Way Forward

Two distinct trends are apparent in the above account. The first is the gradual convergence of the law emerging from the various human rights courts and experts bodies that have been confronted with the question of when states' human rights obligations apply abroad. According to this jurisprudence, these obligations apply whenever a state's agents or instrumentalities exercise control, authority, or power over the individuals whose rights are in jeopardy, such as by virtue of states' control of territory, their custody of the individuals in question, their practical ability to respect and ensure rights, or their essential role in a causal chain leading to the violations. Although this approach is still somewhat in flux in the ECHR, the extent to which these obligations apply extraterritorially is increasingly calibrated to the degree of control the state exercises over the situation in question. Obligations to respect rights, which can be adhered to whenever and wherever states act, attach sooner than obligations to ensure or fulfil rights, which may require the ability to mobilize an array of state institutions that is unavailable to states when they act offshore. The second trend is the growing isolation of the United States in its categorical position that its human rights obligations have no extraterritorial application in light of the text of the relevant instruments and the intentions of the drafters.

Although the United States has since the Bush Administration endeavored to preserve this legal argument, it is time to change course. The United States should use the opportunity of the upcoming Human Rights Committee hearings to relinquish this increasingly untenable and ultimately pointless position. By accepting the graduated and fact-specific approach uniformly adopted by the human rights bodies, the United States can preserve its ability to argue that its obligations do not apply in particular situations, while accepting that they do apply in other well-established contexts that should be uncontroversial, even for the United States—*viz.* when the state exercises plenary authority and control over territory within the borders of another state or when the state holds individuals abroad in its exclusive custody.

Although every litigator endeavors to win on threshold jurisdictional defenses, relinquishing this particular argument is unlikely to significantly disadvantage the United States since it will retain a number of more compelling defenses down the rhetorical cascade. In particular, in the most critical NIAC scenarios, the United States can focus its energies on bolstering its *lex specialis*

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<sup>146</sup> *Id.* at ¶ 510 ("The United States appreciates its ongoing dialogue with the Committee with respect to the interpretation and application of the Covenant, considers the Committee's views in good faith, and looks forward to further discussions of these issues when it presents this report to the Committee.").

<sup>147</sup> United States Written Responses to Questions from the United Nations Human Rights Committee Concerning the Fourth Periodic Report (3 July 2013), at ¶ 2, available at <http://www.state.gov/j/drl/rls/212393.htm>.

argument by educating human rights institutions on its views as to the reach of IHL. Moreover, it has well-developed arguments on the merits as to why its conduct either does not run afoul of its human rights obligations or is otherwise justified. The receptivity of these bodies to more substantive arguments will be enhanced with the distraction of an antagonistic extraterritoriality argument out of the way. Indeed, it could be argued that because the policies so often at issue here are so momentous, the United States should be willing set aside hyper-legalized stratagems altogether and defend its actions on the merits.

To be sure, the United States uniquely vulnerable to claims that it has violated the rights of individuals abroad given the degree to which it has stationed troops and other personnel abroad and the nature of the armed conflicts and counter-terrorism operations in which it is engaged. And yet, in considering this proposal, the United States should keep some perspective. The United States is not subject to any human rights court or tribunal with the power to enforce a judgment against it. And, the option of simply ignoring, or acknowledging while opposing, the pronouncements of a treaty body is always available to the United States. To be sure, there are costs to a finding of responsibility by a human rights institution and to refusing to bring its conduct more fully into compliance with its views. These include reputational costs (such as loss of prestige) and damage to the United States' self-image as a rights-respecting nation that adheres to the rule of law. And yet, the concrete implications that would follow from abandoning an increasingly strained argument are minimal, particularly given that the United States is already subject to many of the same legal rules by virtue of other treaties, such as the Geneva Conventions, whose extraterritorial application is uncontested.<sup>148</sup>

In any case, a fervent fealty to this legal position is having little practical effect. The United States' actions overseas are already subject to searching review by these human rights bodies.<sup>149</sup> The United States has largely consented to this process, "as a courtesy." This attitude no doubt reflects a certain degree of deference to these institutions and to other elements of the international community, but also the pragmatic recognition that responding to allegations of serious abuses with a weak jurisdictional defense followed by silence on the merits will be counter-productive. At the same time, a willingness to respond vigorously to allegations on the merits offers the United States a forum to advance its legal justifications for its actions, proffer factual details and clarifications, address common misconceptions and hyperbole, announce important reforms to law and policy, and admit that our record is not perfect.<sup>150</sup> Indeed, the U.S. interventions have been increasingly humble in light of the serious allegations at issue,<sup>151</sup> while at the same time, defending U.S. actions when justified.<sup>152</sup> The United States has come a long way in its willingness to report on, and entertain questions about, its overseas activities; reverting

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<sup>148</sup> Cleveland, *supra* note \_\_\_\_.

<sup>149</sup> In addition, many of the more controversial aspects of the United States counter-terrorism policy—including the United States' drone program and other forms of targeted killing—are already regularly the subject of criticism by NGOs, United Nations mandate holders (such as the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), and academics.

<sup>150</sup> See, e.g., United States' Response to the Questions Asked by the Committee Against Torture (May 5, 2006), *available at* <http://www.state.gov/j/drl/rls/68561.htm>.

<sup>151</sup> Melish, *supra* note \_\_\_\_, at 239.

<sup>152</sup> See The United States' Oral Response to the Questions Asked by the Committee Against Torture (8 May 2006), <http://www.state.gov/j/drl/rls/68562.htm>.



to total silence is no longer a realistic option. As such, it is unclear why the United States feels so compelled to preserve this argument.

Indeed, the proposed change of course may inure to the United States' benefit in other ways. In addition to enhancing the legitimacy of its other arguments, accepting this case-by-case approach will ensure that the United States' position is better aligned with the views of, and obligations placed on, its coalition partners and other allies. As a practical matter, when the United States acts in coalition, it needs to harmonize its actions with its allies who increasingly accept—some more grudgingly than others—that they are bound by their human rights obligations when they operate abroad. For many of these allies, this includes obligations under the European Convention and its more robust enforcement regime.<sup>153</sup> Subjecting the United States to the same legal framework as our allies will encourage collaboration by ensuring that all parties involved in a particular operation or transaction will be judged by the same standards and have the same potential exposure to censure.<sup>154</sup>

Finally, perhaps the most compelling reason for the United States to adopt a different approach is deontological: because it is the right thing to do. A global human rights system that allows states to act without constraints when they are offshore is untenable. It would invite impunity and, worse, the outsourcing of violations, particularly in this era of globalization. Some measure of extraterritorial application ensures that states' human rights obligations follow them when they exercise control, power, or authority over territory, persons, or transactions abroad. All that said, it will obviously be difficult for the United States to give up an argument that has become almost axiomatic in its interventions in human rights fora. This may be all the more so without a permanent Legal Adviser in place in the U.S. State Department. Nonetheless, the time has come for the United States to relinquish a legal argument that is neither persuasive, efficacious, nor beneficial.

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<sup>153</sup> In this regard, the United States is in a posture that is similar to that governing our compliance with Additional Protocols I and II, which most of our allies have ratified. As a practical matter, we must adhere to these treaties if we are engaged in joint action with such partners. See White House, *Fact Sheet: New Actions on Guantánamo and Detainee Policy* (7 Mar. 2011), available at [http://www.whitehouse.gov/sites/default/files/Fact\\_Sheet\\_-\\_Guantanamo\\_and\\_Detainee\\_Policy.pdf](http://www.whitehouse.gov/sites/default/files/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf) (noting that the United States will adhere to Protocol II and elements of Protocol I as a matter of policy even absent ratification).

<sup>154</sup> See, e.g., *Munaf*, *supra* note \_\_\_\_ (involving a claim against Romania for harm allegedly committed by the United States).